

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

LAVERN BERRYHILL,)	
)	
Plaintiff,)	
)	
)	CIV-10-714-D
v.)	
)	
BESSIE GREENWAY, et al.,)	
)	
Defendants.)	

REPORT AND RECOMMENDATION

Plaintiff, a state prisoner appearing *pro se*, brings this civil rights action pursuant to 42 U.S.C. §1983. In his Complaint, Plaintiff alleges violations of his constitutional rights, and with the Complaint Plaintiff has filed a Motion for Leave to Proceed *In Forma Pauperis*. The matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, it is recommended that Plaintiff's Motion be denied in accordance with 28 U.S.C. § 1915(g) and that Plaintiff be required to pay the full \$350.00 filing fee before being allowed to proceed in this action.

Title 28 U.S.C. § 1915(g), the "three strikes" provision, provides:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief

may be granted, unless the prisoner is under imminent danger of serious physical injury.

This provision does not preclude the filing of a civil action by a prisoner with “three strikes,” but it eliminates the privilege of proceeding *in forma pauperis* unless the prisoner demonstrates the “imminent danger of serious physical injury” exception. If the “imminent danger” exception is not demonstrated, the prisoner with “three strikes” may still proceed in a civil action or appeal by paying the full amount of the filing fee.

Taking judicial notice of the Court’s records, Plaintiff has previously been denied the privilege of proceeding *in forma pauperis* in civil actions filed in this Court based upon the finding that Plaintiff had, at that time, previously filed three civil actions that were dismissed for failure to state a claim for relief and/or as frivolous. See Berryhill v. Halvorson, Case No. CIV-08-197-D (Order entered April 24, 2008, DeGiusti, D.J.); Berryhill v. Poppell, Case No. CIV-99-407-T (Order entered May 25, 1999, Thompson, D.J.). In these cases, Plaintiff’s applications for leave to proceed *in forma pauperis* were denied and the actions were dismissed without prejudice to refiling upon full payment of the filing fee pursuant to 28 U.S.C. § 1915(g). In District Judge Thompson’s Order entered in Berryhill v. Poppell, Case No. CIV-99-407-T, on May 25, 1999, Judge Thompson directed the Clerk of the Court “not to accept for filing from the plaintiff any civil actions accompanied by an application to proceed in forma pauperis unless the complaint alleges the plaintiff is under imminent danger

of serious physical injury.” Plaintiff did not appeal the decisions in these two cases.¹

It is clear from the Court’s records that Plaintiff is subject to the rule in 28 U.S.C. §1915(g) barring him from proceeding *in forma pauperis* in this action unless the exception set forth in the statute applies. In his Complaint, Plaintiff alleges he is being subjected to “involuntary servitude” which is causing him “severe mental anguish [and] emotional distress” However, Plaintiff has made no credible allegation that he is presently in danger of serious physical injury. Because Plaintiff has not demonstrated that he is in imminent danger of serious physical injury, the exception to the application of the “three strikes” provision in 28 U.S.C. § 1915(g) does not apply. Hence, Plaintiff’s Motion for Leave to Proceed *In Forma Pauperis* should be denied and the action should be dismissed unless the filing fee is paid.

RECOMMENDATION

Based on the foregoing findings, it is recommended that Plaintiff’s Motion for Leave to Proceed *In Forma Pauperis* (Doc. # 2) be DENIED and that the cause of action be

¹Taking judicial notice of the records of the United States District Court for the Eastern District of Oklahoma, Plaintiff has recently filed four civil actions in that court which have been dismissed as frivolous and malicious pursuant to 28 U.S.C. § 1915A(b)(1). Berryhill v. Evans, Case No. CIV-10-126-RAW-SPS (Opinion and Order and Judgment entered June 14, 2010, White, D.J.); Berryhill v. Seay, Case No. CIV-10-151-JHP (Opinion and Order and Judgment entered May 10, 2010, Payne, D.J.); Berryhill v. White, Case No. CIV-10-176-JHP (Opinion and Order and Judgment entered June 7, 2010, Payne, D.J.); Berryhill v. Payne, Case No. CIV-10-188-JHP (Opinion and Order and Judgment entered June 14, 2010, Payne, D.J.). In each of these actions, Plaintiff has filed a notice of appeal of the decision, and the decisions may therefore not yet be counted as “prior occasion[s]” for purposes of the 28 U.S.C. § 1915(g) “three strikes” provision unless and until the decisions become final through completion of the appeal process. Jennings v. Natrona County Det. Center Medical Facility, 175 F.3d 775 (10th Cir. 1999).

DISMISSED without prejudice unless Plaintiff pays the \$350.00 filing fee within twenty (20) days from the date of any order adopting this Report and Recommendation. Plaintiff is advised of the right to file an objection to this Report and Recommendation with the Clerk of this Court by July 29th, 2010, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The failure to timely object to this Report and Recommendation would waive appellate review of the recommended ruling. Moore v. United States, 950 F.2d 656 (10th Cir. 1991); cf. Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996)(“Issues raised for the first time in objections to the magistrate judge’s recommendation are deemed waived.”).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter, and any pending motion not specifically addressed herein is denied.

ENTERED this 9th day of July, 2010.


GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE